**DATO' SOO LAI SING**

**v.**

**KUMPULAN SIERRAMAS (M) SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUIT NO: S2(S5)-22-502-2000]
3 JUNE 2004

***CONTRACT:*** *Misrepresentation - Representations by defendants regarding special security measures provided in housing project - Robbery committed at plaintiff's house - Failure to install special security system - Whether amounted to misrepresentation - Whether defendants had committed neglect and carelessness in maintaining security of residence in housing estate*

***CONTRACT:*** *Damages - Assessment - Special and general damages - Robbery committed at plaintiff's house - Whether defendants had committed neglect and carelessness in maintaining security of residence in housing estate*

This was a claim by the plaintiff against the defendant for damages arising from the defendant's neglect and carelessness that had resulted in a robbery being committed at the plaintiff's house. The plaintiff had purchased a housing lot in the 1st defendant's housing project on the strength and belief of certain representations made by the 1st defendant regarding certain special security measures to be provided in the said housing project such as electronic perimeter fencing, CCTV cameras and 24-hour security guards on duty. The 2nd defendant was given the responsibility of providing and enforcing such security. The plaintiff, his wife and children moved into the house constructed on the lot he had purchased sometime in October 1999. On 10 October 2000, his house was broken into and he was robbed of items valued at approximately RM486,988. The plaintiff lodged a police report, and from the subsequent investigation, it was revealed that the robbers had gained entry into the housing estate by cutting open the perimeter fencing adjacent to the plaintiff's house. At the time of the incident, the defendants had neither electronically installed the perimeter fencing nor put into operation the CCTV cameras.

**Held (allowing the plaintiff's claim):**

**[1]** In so far as the plaintiff was concerned, the defendants should have installed the whole security system from the time the plaintiff was in occupation of the house *ie*, October 1999. At the date of the incident on 10 March 2000, the defendants had not installed the special security system yet, and this resulted in a robbery being committed in broad daylight without being

detected by the defendants' security guards. In the circumstances, the 1st defendant had failed to provide the unique or special security measures as it had earlier represented to the plaintiff; this was tantamount to an act of misrepresentation. (pp 239 g-h & 240 a)

**[2]** The number of security guards employed by the defendants to man the security of the housing estate was totally insufficient and inadequate. The fact that the security guards were unable to detect the occurrence of the robbery until after the defendants were subsequently informed indicated clearly the poor and sub-standard nature of movements and the area covered by the mobile security guards on duty. The defendants could certainly not claim that they were providing special security features. Hence, the 2nd defendant had committed neglect and carelessness in maintaining the security of the residence in the housing estate. (p 241 c-e)

**[3]** The plaintiff was entitled to claim damages against both defendants. He should be allowed to recover from the defendants the value of his personal property lost during the robbery in the form of special damages amounting to RM486,988 plus interest at the rate of 8% per annum from the date of this suit until the date of settlement. The plaintiff should be awarded costs, and based on the authority of the Federal Court case of *Tham Cheow Toh v. Associated Metal Smelters Ltd*, he should also be awarded general damages because of the suffering and traumatic shock that he and his family had undergone due to the robbery. (pp 241 f & 242 c-e)

*[Ordered accordingly.]*

**Case(s) referred to:**
*Tham Cheow Toh v. Associated Metal Smelters Ltd [1972] 1 MLJ 172* ***(foll)***

**Legislation referred to:**
Contracts Act 1950, ss. 18, 74(1)

*For the plaintiff - SS Tieh (Olivia Ho); M/s Paul Ong & Assoc*
*For the defendants - Maidzuara Mohammed (TM Yap); M/s Logan Sabapathy & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Azmel Maamor J:**

In this case the plaintiff claimed against the defendants for damages arising from the defendants' failure, neglect and/or carelessness which had caused a robbery committed at the plaintiff's house.

The brief facts of the case are as follows. The promotion for the sale of housing lots of the 1st defendant's housing project known as Sierramas Resort Homes had been extensively advertised. Brochures had been distributed to the public stating the provision of special features of the said housing project thereby making it unique as compared to other housing projects. What was specifically stressed on the provision of the special features was the provision of special or unique security measures that would ensure the safety and tranquility of the residents staying in the said housing project. The plaintiff was made aware of this project through one Arthur Tan of Tan & Tan Development Bhd. who persuaded the plaintiff to attend the soft launch of the project on 10 March 1995 at the Headquarters of Tan & Tan at Jalan Tun Razak, Kuala Lumpur.

The plaintiff did attend the soft launch of the said project and made inquiries from the 1st defendant's staff regarding the uniqueness of the said project. In their explaination regarding the nature of the special features to be provided by them, the defendant's employees and agent informed the plaintiff that type of security measures to be provided would include electronic perimeter fencing and CCTV cameras. In addition they would also provide 24 hours security guards on duty together with security dogs. These security features were told to the plaintiff mainly by one Rena Lam (DW4). And any doubts that the plaintiff might have had as regards the special security features were eventually removed when confirmed to the plaintiff by one K.C. Chong (DW3), the marketing and sales director of Tan & Tan Development Bhd. On the strength and belief of such representations the plaintiff immediately made a decision to purchase a housing lot in the said housing project even though he was fully aware that the purchase price of this lot was much higher than the price of similar lots at other housing projects. The selling point was the provision of the special security features to be provided in this housing project. According to the arrangements the responsibilities of providing such security features and enforcing such security actions were given to the 2nd defendant.

The plaintiff together with his wife and children moved into the house constructed on the lot which he purchased sometime in October 1999, fully convinced that he had nothing to fear or worry as regards the security and safety of him and his family while staying in this new house. However on 10 March 2000 at about 8am while the plaintiff and members of his family were

still sleeping, three persons broke into his house. The robbers took away valuable items belonging to the plaintiff and his family namely, cash in Singapore dollars and Malaysian Ringgit, Rolex watches, jewelleries, hand-phones, Dunhill pens, a shot-gun and other miscellaneous items. The total value of the items taken away by the robbers was approximately RM486,988. A police report was subsequently lodged by the plaintiff in respect of the said robbery.

From the investigation it was revealed that the robbers gained entry into the housing estate by cutting open the perimeter fencing adjacent to the plaintiff's house. At the time of the incident the defendants had not caused the perimeter fencing to be electronically installed. Nor were the CCTV cameras in operation.

The only issue that had to be determined in this case is whether the robbery that took place at the plaintiff's house was due to the failure, neglect and/or carelessness of the defendants.

At the hearing there was only one witness for the plaintiff, while the defendants called five witnesses including Rena Lam (DW4) and K.C. Chong (DW3).

In consideration of the evidence adduced at the hearing it was my finding that the 1st defendant did represent to the purchasers of the said housing project that it would provide the special security features at the said housing project. And these special security features would include electronic perimeter fencing, CCTV cameras and 24 hours security guards on duty. That the defendants would provide these special security measures had been clearly stated by the plaintiff (PW1) in his evidence. He went on to state it was because of these special security features to be provided by the defendants that he decided to purchase the lot and to stay in the housing estate. That the defendants had agreed to provide such security features had been admitted by DW3, Chong Kim Chuan. Under cross-examination DW3 said:

> The unique features of the Sierramas Homes are:
>
> 1. It has perimeter fencing.
> 2. It has security entrance with guard house and guard patrol.
> 3. It has extensive landscapping.
> 4. The perimeter fencing have also CCTV cameras monitored from the guard house.

But what appeared to be more convincing and committed is what the defendants had openly highlighted in their newsletter as regard the unique security features of the Sierramas Homes. At pp. 115 and 116 of Bundle C (Admitted Documents), the newsletter claimed as follows:

*To enter an estate, one has to get past the perimeter security, which consists of two aspects; physical security, which at Sierramas takes the form of a special fence, and electronic security.*

*A perimeter security system – like any good security system – should do three things, which Dimmick refers to as "the three D's." It should Deter, Delay and Detect*

The Sierramas residential estate is surrounded by a special physical fence manufactured in the UK by TWIL Fencing Products, experts in fencing systems. From an aesthetic point of view, this special mesh exhibits the qualities of a normal fence – by allowing people to see through it, it avoids being a potentially oppressive visual barrier that blocks out views. Yet at the same time it manages to look more daunting than a normal fence, giving the impression of being "a physical barrier that's going to take some getting through." This characteristic makes the fence a good deterrent.

More importantly, perhaps, the mesh not only looks forbidding to would be-intruders, it is forbidding its small aperture size makes it finger proof and extremely difficult to scale or penetrate. It thus provides a high delay factor, giving security personnel adequate time to respond.

The physical fence on its own, however, is unable to do the third D – detection. This role, therefore, falls to the electronic systems. Employing fibre-optic technology, the system at Sierramas allows security executives to detect any movements or disturbances along the fence.

One way in which this is done is through a device known as a Video Motion Detector. When monitoring a portion of the fence, this video device can recognise movements in the environment through differences in light patterns. Within a given area, anything that moves which should not be moving will set off an alarm. (emphasis added).

The provision of such security measures at the Sierramas Homes was reiterated in another issue of the defendants' newsletter as found at p. 118 (Bundle C). The relevant portion reads:

*Naturally, we want you to safely enjoy the vast open space at Sierramas. And to feel safe, you need not have grills and gates which would make you feel like a prisoner rather that a resort home owner. Here at Sierramas, the entire perimeter is secured so that you can have the peace of mind to enjoy life within it.*

*The security system comprises British-designed perimeter fencing which uses electronic and fibre optic technology. The highly sensitive and intelligent fence is able to detect movements in its vicinity and alert the security personnel via the Video Motion Detector*. Because the fence is able to distinguish harmless movements from real intrusion, false alarms are therefore minimised. Also, power cuts will not affect the security system since there is a reliable back-up system.

> Apart from the fence, the main entrance and the emergency entrances are monitored 24 hours a day. 'Video Electronic Identification' will identify non-residential vehicles. In additional to the security system, an intercom network is installed to confirm your guests' identities and to announce their arrival. (emphasis added).

In the light of the above evidence I was fully convinced that the defendants did represent to the plaintiff the existence of such special or unique security features in the said housing project which completely persuaded the plaintiff to decide to buy a housing lot there and construct a house and stay there. And when the plaintiff and his family moved in to stay in the house in the Sierramas Homes it was his full expectation that the defendants had provided him with the said security measures as had been represented to him. In other words all aspects of security and safety would be well taken care of by the defendants.

But that did not turn out to be true as expected. The plaintiff's house was broken into by three robbers on 10 March 2000 at about 8am. And from the evidence of the cutting of the perimeter fencing near the plaintiff's house it can be conclusively concluded that the robbers entered the housing estate by cutting open the perimeter fence. During the entire robbery until the robbers left with their loot none of the security guards came to the plaintiff's rescue. Needless to say the defendants had no knowledge whatsoever of the incident until after they were subsequently informed. What had happened to the electronic perimeter fencing and the CCTV cameras which the defendants had promised to provide? The real truth was that on the date of incident the electronic system to the perimeter fencing had not been installed, nor were the CCTV cameras commissioned. From the evidence adduced the CCTV cameras and the electronic system to the perimeter fencing were commissioned much later after the incident.

The issue to be determined is at which point of time must the defendants install the entire special security system which they had promised to provide. In my view such security features must exist and must be in operation at the time when any purchaser had come to stay in the house he purchased in the housing project. Hence in so far as the plaintiff is concerned the defendant should have installed the whole security system from the time the plaintiff occupied the house ie, in October 1999. At the date of incident on 10 March 2000 the defendants had not installed the special security system yet. Had the system of electronic perimeter fencing and CCTV cameras been installed and operational I am quite certain the security guards would be able to detect the entry of the robbers at the perimeter fence before reaching the plaintiff's house, thereby the robbery at the plaintiff's house could have been aborted. Because the defendants did not provide such unique security system as promised a robbery in broad daylight was allowed to be committed without being detected or known by the

defendants' security guards – a real mockery which smacks hard on the faces of the defendants. In the circumstances it was my conclusion that the 1st defendant had failed to provide the unique or special security measures as they had earlier represented to the plaintiff. This tantamounts to an act of misrepresentation.

The term "misrepresentation" has been defined under s. 18 of the Contracts Act 1950 as follows:

> 18. "Misrepresentation" includes:
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject matter of the agreement.

In the instant case the plaintiff had decided to purchase the lot in the housing project and stayed in the house together with his family on the representation of the 1st defendant that they would provide unique security measures which include CCTV cameras and electronic perimeter fencing.

When the robbery took place there was no CCTV cameras installed and the perimeter fence had no electronic system. If the above said security system had been in place the cutting of the perimeter fence would have been immediately detected thereby alerting the security guards. As such the robbery could have been aborted. As a result of the robbery the plaintiff had suffered losses of his personal properties.

The 2nd defendant was fully aware of the type and standard of security that it had to provide to come within the meaning of special security system as expected by the residents which the system the 1st defendant had earlier on promised and represented. Therefore when they had not installed the electronic perimeter fencing and the CCTV cameras it would be incumbent upon the 2nd defendant to employ sufficient number of security guards and security dogs on twenty-four hours duty to ensure that the security of the residents were maintained at a standard that would have been provided by installing electronic perimeter fencing and CCTV cameras.

According to the evidence of Tan Chor Hwa (DW5), the Executive Director of Kumpulan Sierramas, to man the whole housing estate they employed 15 security guards and hired 14 contract guards. These 14 contract guards were hired in the light of the non-functioning of the electronic perimeter fencing and the CCTV cameras. And they thought that would be sufficient to ensure high standard of security.

In my view based on the facts and circumstances of this case the manning of the security of the housing estate with the number of security guards employed by the defendants was totally insufficient and inadequate. At the time of the robbery none of the security guards were on duty near the perimeter fence where the entry was made by the robbers. This shows that the area each particular security guard had to cover was either too wide or the guard did not do his job properly. Had there been a security guard nearby, the robbers would not dare to enter the housing estate by cutting the perimeter fence. That the security guards had not been able to detect the occurrence of such robbery, until after the defendants were subsequently informed, indicates clearly the poor and substandard nature of movements and area covered by the mobile security guards on duty. In other words the manner the robbery was committed would appear as if there were no security guards at all on duty at the housing estate. It appears much worse when the robbery was committed in broad daylight at about 8am. Certainly the defendants could not claim that they were providing special security features to the housing estate. In the circumstances the 2nd defendant had committed neglect and carelessness in maintaining the security of the residence in the housing estate.

After having considered the whole facts and circumstances of this case I found both the defendants liable to the plaintiff.

Based on the evidence adduced at this hearing it is my conclusion that the plaintiff is entitled to claim damages against both defendants. In this case the plaintiff had lost his personal properties in the robbery.

The relevant provision of the Contracts Act 1950 in respect of this issue is s. 74(1) which states:

> 74(1) When a contract has been broken, the party who suffers the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach.

In the Federal Court case of *Tham Cheow Toh v. Associated Metal Smelters Ltd.* [1972] 1 MLJ 172, Ali FJ, in dealing with measure of damages recoverable from such breach of contract, said:

> The measure of damages recoverable involves the consideration of Section 74 of the Contracts (Malay States) Ordinance which substantially affirm the rule of common law laid down in *Hadley v. Baxendale* [1985] 9 Excb 341 which was in two parts, namely (1) damages arising naturally ie, according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In considering the extent of damages to be awarded I was of the view that the plaintiff should be allowed to recover from the defendants the value of his personal property lost during the robbery, in the form of special damages which he claimed in his statement of claim amounting to RM486,988 plus interest at the rate of 8% p.a. from the date of this suit till the date of settlement. I also awarded cost to the plaintiff. However, I did not give any compensation to the plaintiff in respect of his claim for general damages. Based on the authority of the Federal Court case *Tham Cheow Toh (supra)* I should have also awarded general damages to the plaintiff for the sufferings and traumatic shocks he and his family had undergone due to the robbery. Based on the nature of the unique security system promised to be provided by the defendants there was very little likelihood that the said robbery could have been committed without being detected by the defendants.

I also awarded costs of this suit to the plaintiff.